STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS
Murphy, P.J., and White and Smolenski, JJ.

MUNICIPAL EMPLOYEES RETIREMENT SYSTEMS OF MICHIGAN,

Petitioner-Appellee,

v

CHARTER TOWNSHIP OF DELTA,

Respondent-Appellant.

Supreme Court No. 129041
Court of Appeals No. 260534-L
Tax Tribunal No. 00-306773

BRIEF ON APPEAL - APPELLANT

ORAL ARGUMENT REQUESTED

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JUDGMENT AND ORDER APPEALED AND RELIEF SOUGHT

Respondent-Appellant Charter Township of Delta ("Delta Township") appeals the Michigan Court of Appeals' decision in *Municipal Employees Retirement Systems of Michigan v Charter Township of Delta*, 266 Mich App 510; 702 NW2d 665 (2005), Michigan Court of Appeals Docket No. 260534, lv gtd, 708 NW2d 434; 2006 Mich LEXIS 205 (2006) **(Appellant's Appendix** - tab 9, p. 128a). In its decision, the Michigan Court of Appeals ruled that vacant investment properties owned by Petitioner-Appellee Municipal Employees Retirement Systems of Michigan ("MERS") are exempt from ad valorem taxation under Section 7m of the General Property Tax Act (MCL 211.7m) and other Michigan law.

The Michigan Court of Appeals' decision reversed an earlier Order of the Michigan Tax Tribunal (**Appellant's Appendix** - tab 5, p. 56a), which Order had granted summary disposition in favor of Delta Township. The Michigan Tax Tribunal ruled that MERS' investment properties did not meet MCL 211.7m's "current public use" requirement and thus were not entitled to a tax exemption under MCL 211.7m.

Delta Township respectfully requests that the Michigan Supreme Court reverse the Michigan Court of Appeals' judgment and affirm the Michigan Tax Tribunal's Order.

STATEMENT OF JURISDICTION

"The Supreme Court may . . . review by appeal a case . . . after decision by the Court of Appeals." MCR 7.301. Grounds for review by this Court include "an appeal from a decision of the Court of Appeals, [which] decision is clearly erroneous and will cause material injustice or the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals." MCR 7.302(B)(5).

On January 31, 2006, this Court issued an Order granting Delta Township's Application for Leave to Appeal the May 24, 2005 judgment of the Court of Appeals. Accordingly, this Court has jurisdiction over this matter.

QUESTION PRESENTED FOR REVIEW

DID THE MICHIGAN COURT OF APPEALS COMMIT CLEAR LEGAL ERROR BY RULING THAT VACANT LAND OWNED BY MERS SOLELY FOR INVESTMENT PURPOSES IS EXEMPT FROM TAXATION PURSUANT TO SECTION 7m OF THE GENERAL PROPERTY TAX ACT (MCL 211.7m), WHEN SUCH AN EXEMPTION IS NOT CLEARLY AND UNAMBIGUOUSLY GRANTED BY:

- MCL 211.7m;
- THE MUNICIPAL EMPLOYEES RETIREMENT ACT OF 1984 AND/OR THE PUBLIC EMPLOYEE RETIREMENT SYSTEM INVESTMENT ACT OF 1965; OR
- ANY OTHER MICHIGAN STATUTE?

Respondent-Appellant Delta Township says:	Yes
Petitioner-Appellee MERS says:	No
The Michigan Tax Tribunal says:	Yes
The Michigan Court of Appeals says:	No

STATEMENT OF FACTS

Delta Township is a charter township organized and operating under the Michigan Charter Township Act. MCL 42.1, *et seq.* Delta Township is located in Eaton County, just west of Lansing.

MERS is "a Michigan public corporation created pursuant to the Municipal Employees Retirement Act of 1984 ("MERA"), MCL 38.1501, *et seq.*, for the purpose of administering a governmental pension plan and related benefits to employees of participating governmental agencies." *Municipal Employees Retirement Systems of Michigan v Charter Township of Delta*, 266 Mich App 510, 511; 702 NW2d 665 (2005), Michigan Court of Appeals Docket No. 260534, lv gtd, 708 NW2d 434; 2006 Mich LEXIS 205 (2006) (**Appellant's Appendix** - tab 9, p. 128a). Pursuant to Section 39 of MERA (MCL 38.1539):

> (1) The retirement board shall be the trustees of the money and other assets of the retirement system. The board shall have full power and authority to invest and reinvest the money and other assets of the retirement system subject to all terms, conditions, limitations, and restrictions imposed on the investment of assets of public employee retirement systems by Act No. 314 of the Public Acts of 1965, being sections 38.1132 to 38.1140i of the Michigan Compiled Laws. The retirement board may employ outside investment counsel to advise the board in the making and disposition of investments.
>
> (2) All money and other assets of the retirement system shall be held and invested for the sole purpose of meeting disbursements authorized in accordance with the provisions of this act and shall be used for no other purpose. In exercising its discretionary authority with respect to the management of the money and other assets of the retirement system, the retirement board shall exercise the care, skill, prudence, and diligence under the circumstances then prevailing, that a person of prudence, acting in a like capacity and familiar with such matters, would use in the conduct of an enterprise of like character with like aims.

Public Act 314 of 1965, also known as the Public Employee Retirement System Investment Act ("PERSIA"), MCL 38.1132, *et seq.*, provides that "invest" or "investment" means:

> the utilization of money in the expectation of future returns in the form of income or capital gain. Investments initially purchased in accordance with this act which subsequently do not qualify for purchase for any reason, shall be considered to continue to meet the requirements of this act. Investment includes a guarantee by an investment fiduciary. MCL 38.1132c.

In 2003, MERS acquired three contiguous parcels of vacant land within Delta Township. MERS does not, and apparently has no plans to, actively or actually use or develop the vacant property. MERS purchased the land solely as an investment, and continues to hold it for that reason.

"After receiving notices of assessments concerning the 2004 assessed values of the property," MERS "protested to the Delta Township Board of Review." *Municipal Employees Ret Sys of Mich, supra* at 511 (**Appellant's Appendix** - tab 9, p. 128a). MERS "challenged the valuation and claimed that the parcels were exempt from ad valorem taxation pursuant to MCL 211.7m because the parcels were . . . part of a diversified portfolio that benefited public employees. The board of review lowered the assessed values, but rejected the claim of exemption." *Id.*

Unsatisfied with the board of review's decision, MERS appealed to the Michigan Tax Tribunal (the "Tax Tribunal"). Following MERS' filing its Petition for Exemption with the Tax Tribunal in May 2004, Delta Township filed its Motion for Summary Disposition and/or to Dismiss Petition for Exemption (**Appellant's Appendix** - tab 3, p. 5a) pursuant to MCR 2.116(C)(8) and/or (C)(10), because the issues presented by MERS' Petition were purely legal in nature. It was clear to Delta Township that, once the parties had briefed the issues, the Tax Tribunal could rule on the case as a matter of law based upon the pleadings, as well as any other documentary evidence presented by MERS in its response to Delta Township's Motion.

(**Appellant's Appendix** - tab 4, p. 35a). There were no disputed issues as to any material facts, discovery was unnecessary, and Delta Township asserted that it was entitled to a judgment as a matter of law, even though all facts would be construed strictly in MERS' favor.

No oral argument was had because a hearing was not ordered by the Tax Tribunal.[1] In its January 12, 2005 Order (**Appellant's Appendix** - tab 5, p. 56a), the Tax Tribunal granted summary disposition in favor of Delta Township, correctly determining that MERS' investment property was not entitled to a tax exemption. The Tax Tribunal's Order concluded that, when construing tax exemption statutes, "[t]he statute must be read strictly in favor of the taxing body, the exemption must be granted in clear and express terms, and an exemption may not arise by implication." Order, p. 4 (**Appellant's Appendix** - tab 5, p. 59a). Further, the Tax Tribunal ruled that "real property held for investment purposes, even where eventual proceeds may further an exempt purpose, is taxable." *Id.* The Tax Tribunal ultimately held that MCL 211.7m does not clearly and expressly authorize the tax exemption sought by MERS, and thus ruled in Delta Township's favor. *Id.*

MERS appealed as of right to the Michigan Court of Appeals. In a decision dated May 24, 2005, the Court of Appeals reversed the Tax Tribunal's Order, holding that MERS' act of holding real property assets in its investment portfolio, "ready for liquidation to meet its statutorily mandated disbursement requirements," is a present and public use of the property. *Municipal Employees Ret Sys of Mich, supra* at 513 (**Appellant's Appendix** - tab 9, p. 129a). Consequently, the appellate court ruled that MERS' investment property is exempt from real property taxation under MCL 211.7m and other Michigan law. *Id.*

[1] Tax Tribunal rules do not permit a party to request a hearing on a motion. MTT R 230(4).

Less than a month later, on June 21, 2005, the Michigan Court of Appeals issued another decision involving MCL 211.7m, which decision arguably conflicts with the appellate court's opinion in the instant dispute. *Mt. Pleasant v State Tax Comm*, 267 Mich App 1; 703 NW2d 227 (2005), Michigan Court of Appeals Docket No. 253744, lv gtd, 708 NW2d 110; 2006 Mich LEXIS 17 (2006), Michigan Supreme Court Docket No. 129453. In *Mt. Pleasant*, the Court of Appeals ruled that property acquired by the City of Mt. Pleasant and marketed for economic development purposes is not "used for a public purpose," and thus is not exempt from taxation under MCL 211.7m. *Id.* In reaching its decision in *Mt. Pleasant*, the appellate court recognized that "[t]ax exemptions are construed narrowly," and reasoned that property must be "actively, actually used" to qualify for the tax exemption granted by MCL 211.7m. *Id.* at 5. The court concluded that the city's ownership and marketing of the property for economic development purposes was not a "use" contemplated by MCL 211.7m, and thus the property was subject to taxation. *Id.* at 4-5.

On July 5, 2005, Delta Township filed its Application for Leave to Appeal with this Court. That application was granted pursuant to an Order of this Court dated January 31, 2006. Pursuant to that Order, this case is to be argued and submitted to the Court with the *Mt. Pleasant* case.

Delta Township respectfully requests that this Court rule that MERS' investment property is subject to ad valorem taxation, reverse the Michigan Court of Appeals' May 24, 2005 judgment in this case, and affirm the Tax Tribunal's January 12, 2005 Order.

ARGUMENT

I. THE MICHIGAN COURT OF APPEALS' DECISION CONSTITUTES CLEAR LEGAL ERROR AND SHOULD BE REVERSED BECAUSE THE APPELLATE COURT, IN RULING THAT MERS' VACANT INVESTMENT PROPERTIES ARE EXEMPT FROM AD VALOREM TAXATION, DISREGARDED THE HEAVY PRESUMPTION IN FAVOR OF TAXATION.

A. Standard of Review.

Statutory construction and interpretation is a question of law, which this Court reviews on a *de novo* basis. *County of Wayne v Hathcock*, 471 Mich 445, 455; 684 NW2d 765, 772 (2004).

B. Application of Standard.

This dispute centers around MCL 211.7m, a statutory tax exemption. To properly frame the issue, it is important to recognize that Michigan law establishes a strong presumption in favor of taxation. The presumption provides that (1) tax exemption statutes are narrowly construed, and (2) tax exemptions must be expressly authorized by the Michigan Legislature and cannot be inferred from ambiguous statutory language. In reaching its decision in the instant dispute, however, the Court of Appeals failed to recognize that tax exemptions are construed more narrowly than general statutes and that tax exemptions are never inferred or presumed.

Michigan law requires a strict construction of the legal authority cited by MERS, namely MCL 211.7m, MERA, and PERSIA, to determine whether the tax exemption that MERS seeks has been expressly granted by the Michigan Legislature. MERS bears a heavy burden in this case because "the burden of proving an entitlement to an exemption is on the party claiming the right to the exemption." *Guardian Indust Corp v Department of Treasury*, 243 Mich App 244, 249; 621 NW2d 450 (2000) [citing *Elias Bros Rest, Inc v Department of Treasury*, 452 Mich 144, 149-50; 549 NW2d 837 (1996)]. The burden is significant because tax exemption statutes are "strictly

construed in favor of the taxing authority." *Michigan United Conservation Clubs v Lansing Twp*, 423 Mich 661, 664; 378 NW2d 737 (1985).

Tax exemptions are subject to strict construction and must be granted in clear and specific terms. *Retirement Homes of the Detroit Annual Conference of the United Methodist Church, Inc v Sylvan Twp*, 416 Mich 340, 348; 330 NW2d 682 (1982); and *Detroit Edison Co v Department of Revenue*, 320 Mich 506; 31 NW2d 809 (1948).

> This Court has long held that since "[exemption] from taxation effects the unequal removal of the burden generally placed on all landowners to share in the support of local government [and since] exemption is the antithesis of tax equality, exemption statutes are to be strictly construed in favor of the taxing unit."

Ladies Literary Club v Grand Rapids, 409 Mich 748, 753; 298 NW2d 422 (1980) (citations omitted).

> An intention on the part of the legislature to grant an exemption from the taxing power of the state will never be implied from language which will admit of any other reasonable construction. ***Such an intention must be expressed in clear and unmistakable terms, or must appear by necessary implication from the language used***, for it is a well-settled principle that, when a special privilege or exemption is claimed under a statute, charter or act of incorporation, it is to be construed strictly against the property owner and in favor of the public. This principle applies with peculiar force to a claim of exemption from taxation. ***Exemptions are never presumed, the burden is on a claimant to establish clearly his right to exemption, and an alleged grant of exemption will be strictly construed and cannot be made out by inference or implication but must be beyond reasonable doubt.***

Id. at 754 [citing 2 Cooley on Taxation (4th Ed), § 672, pp. 1403-1404] (emphasis added).

This Court's stringent "beyond a reasonable doubt" standard of proof illustrates the burden that a party claiming a tax exemption must overcome to prove the existence of a tax exemption. To find that MERS is entitled to a tax exemption, this Court is required to find that the law unequivocally authorizes the exemption. "[A]n honest doubt based upon reason" as to whether the

legal authority cited by MERS establishes the tax exemption it seeks necessarily precludes a conclusion that the exemption exists. See *People v Jackson*, 167 Mich App 388, 392; 421 NW2d 697 (1988).

In a case where it correctly followed this Court's precedent, the Michigan Court of Appeals recognized that "tax exemption statutes are in derogation of the general principle of equality in taxation and are thus to be strictly construed." *Edsel & Eleanor Ford House v Grosse Pointe Shores*, 134 Mich App 448, 456-57; 350 NW2d 894 (1984). Likewise, in *Mt. Pleasant*, the Court of Appeals commenced its analysis by recognizing that "[t]ax exemptions are construed narrowly." *Mt. Pleasant, supra* at 3. In this case, by contrast, the Court of Appeals did not mention in its decision either the presumption in favor of taxation or the principle that tax exemption statutes must be strictly construed. See *Municipal Employees Ret Sys of Mich, supra* (**Appellant's Appendix** - tab 9, p. 128a). Thus, the Court of Appeals likely did not consider those legal principles in reaching its decision.

If one ignores strict construction and the presumption against taxation, it is possible, using the standard rules of statutory construction that apply to general statues, out-of-context references to ancillary statutes, and unjustifiable leaps in logic, to "cobble together" an argument (albeit a legally deficient one) that MERS' land is exempt from taxation. That is how MERS has argued its position throughout this litigation, and that is how the Court of Appeals arrived at its decision to reverse the Tax Tribunal's Order and grant MERS an exemption. However, as mentioned above, an interpretation of a tax exemption statute must begin with recognition of the presumption against a tax exemption, and any tax exemption must be strictly construed. Again, as the Court of Appeals recognized in *Mt. Pleasant*, but not in *Municipal Employees Ret Sys of Mich*, "[t]ax exemptions

are construed narrowly." *Mt. Pleasant, supra* at 3, [citing *Skybolt Partnership v City of Flint*, 205 Mich App 597, 602; 517 NW2d 838 (1994)].

Although the Court of Appeals' failure to consider the common law rule regarding the interpretation and construction of a tax exemption statute may not, by itself, constitute reversible error, the fact that the court's misstep caused it to reach the wrong conclusion clearly warrants reversal. See *Van Slooten v Larsen*, 86 Mich App 437, 449; 272 NW2d 675 (1978) (holding that a common law presumption, unlike a statutory presumption, is not "conclusive" and "may be rebutted"). At a minimum, the fact that the Court of Appeals' analysis did not require MERS to rebut the heavy burden against a tax exemption should arouse suspicion about the validity of the court's conclusion.

The Court of Appeals' failure to strictly construe the statutes at issue in this dispute allowed it to reach the mistaken conclusion that MERS is entitled to a tax exemption despite the fact that the law does not expressly state nor necessarily imply that MERS may hold its investment properties without being taxed. As correctly recognized by the Tax Tribunal in its Order, when construing tax exemption statutes, "[t]he statute must be read strictly in favor of the taxing body, the exemption must be granted in clear and express terms, and an exemption may not arise by implication." Order, p. 4 (**Appellant's Appendix** - tab 5, p. 59a).

While Delta Township expresses no opinion regarding the merits or outcome of *Mt. Pleasant* (which case will be argued and submitted to the Court with this dispute), Delta Township believes that, had the Court of Appeals used the same analysis in this case as it employed in *Mt. Pleasant*, it would have upheld the Tax Tribunal's decision in favor of the Township. As mentioned above, the court in *Mt. Pleasant* (1) considered the presumption in favor of taxation,

(2) strictly construed the statues at issue, and (3) looked for an express statutory tax exemption, but found none. The appellate court's decision in the instant dispute, in contrast, failed to strictly construe MCL 211.7m and disregarded -- or at least failed to consider -- the strong presumption of taxation established by this Court's precedent, allowing it to infer a tax exemption where none actually exists.

This Court should reverse the Court of Appeals' decision in this case because MERS did not and cannot overcome the significant presumption in favor of taxation. To overcome that burden, MERS must demonstrate that MCL 211.7m, or some other applicable statute(s), clearly and unmistakably provide an exemption under the specific facts of this case. 2 Cooley on Taxation (4th Ed), p. 1403, § 672. The Court of Appeals failed to recognize the presumption against taxation, and instead inferred a tax exemption in favor of MERS. Thus, the appellate court's decision is the result of faulty legal analysis. Because MERS cannot surmount the presumption in favor of taxation, the Court of Appeals' decision constitutes clear legal error and should be reversed by this Court.

II. THE MICHIGAN COURT OF APPEALS' DECISION CONSTITUTES CLEAR LEGAL ERROR AND SHOULD BE REVERSED BECAUSE MERS' VACANT INVESTMENT PROPERTY IS NOT "USED FOR" OR "USED TO CARRY OUT" A "PUBLIC PURPOSE" AS CONTEMPLATED BY MCL 211.7m.

A. Standard of Review.

Delta Township incorporates by reference the *de novo* standard set forth in Section I(A) of the Argument.

B. Application of Standard.

1. Introduction.

At issue in this dispute is whether MERS' vacant investment property is subject to ad valorem taxation under MCL 211.7m (Section 7m of the General Property Tax Act). MCL 211.7m grants an exemption from real property taxes to land that is owned by certain public entities and is either "used for public purposes" or "used to carry out a public purpose." MCL 211.7m provides, in full, as follows:

> Property owned by, or being acquired pursuant to, an installment purchase agreement by a county, township, city, village, or school district *used for public purposes* and property owned or being acquired by an agency, authority, instrumentality, nonprofit corporation, commission, or other separate legal entity comprised solely of, or which is wholly owned by, or whose members consist solely of a political subdivision, a combination of political subdivisions, or a combination of political subdivisions and the state and is ***used to carry out a public purpose*** itself or on behalf of a political subdivision or a combination is exempt from taxation under this act. Parks shall be open to the public generally. This exemption shall not apply to property acquired after July 19, 1966, unless a deed or other memorandum of conveyance is recorded in the county where the property is located before December 31 of the year of acquisition, or the local assessing officer is notified by registered mail of the acquisition before December 31 of the year of acquisition. MCL 211.7m (emphasis added).

The three parcels of real property for which MERS seeks a tax exemption are vacant investment lands not actually or actively used for, or to carry out, any public purpose as contemplated by MCL 211.7m. In fact, the property is not actually or physically used for *any* purpose by MERS or any other party. MERS has not developed the property, nor does it or any other entity physically use the property. Thus, MERS' "use" of the property is limited to owning it and holding it in its investment portfolio. Under Michigan law, however, ownership alone is insufficient to qualify for a tax exemption under MCL 211.7m.

MERS believes that the three parcels of property at issue are exempt from taxation because the acquisition of real estate for investment purposes is a public purpose when undertaken by a statewide

public corporation whose statutory purpose is the administration of public pension plans and the investment of the assets of those plans. MERS manufactures its "patchwork" argument in favor of a tax exemption primarily using MCL 211.7m in conjunction with ancillary provisions from MERA and PERSIA, the statutes that grant MERS its powers.

Under well-established Michigan law, an entitlement to a tax exemption cannot be inferred, and a valid legal argument that advocates in favor of an exemption cannot be manufactured or "cobbled together" from disparate statutory provisions and questionable leaps in logic. Instead, there is a heavy presumption in favor of taxation. Indeed, this Court must be convinced "*beyond a reasonable doubt*" that the Legislature intended the tax exemption contained in MCL 211.7m to apply to MERS' investment property. See *Ladies Literary Club, supra* at 754 (emphasis added).

2. MERS' Vacant Investment Property is Not "Used For" or "Used to Carry Out" a "Public Purpose" as Contemplated by MCL 211.7m.

If property is owned by a public entity, there are two additional requirements for a tax exemption under MCL 211.7m. First, a parcel must be "used", and second, that use must be "for" or "to carry out" a "public purpose." The statute does not expressly grant an exemption for property that is merely owned but not used. Thus, MERS has the burden of convincing this Court that vacant, unused land is actually "used" when a public entity holds it for investment purposes. It is obvious, however, that under the strict legal principles of statutory construction required for tax exemption statutes, MCL 211.7m's plain language does not clearly and unambiguously grant an exemption to vacant lands held exclusively for investment purposes. Thus, MERS' property is not exempt from taxation.

In *Traverse City v East Bay Twp*, 190 Mich 327; 157 NW 85 (1916), this Court addressed whether a city's vacant land was used for public purposes and, therefore, exempt from taxation.

Traverse City purchased 960 acres of undeveloped land, located in East Bay Township, which it planned to develop into a power plant at some point in the future. *Id.* at 327. Counsel for the city stated as follows:

> [The land] is not being used, we admit that it is undeveloped now, but being held for the purpose of future development -- of developing additional power in the future, the same as it was held by the predecessor of the city, with that in view, we don't claim that it is part of the present plant, but simply land that is held with a view of developing additional power when the city needs it. There is a good waterfall there, and we expect to develop it or use it when the business of the city demands it. We hold this as a reserve and we claim it as exempt; and, when developed, it will all be used together, but nothing at all has been done yet toward developing it. *Id.* at 328.

Accordingly, in *Traverse City*, this Court was confronted with facts very similar to those in the present dispute, and had to resolve the following question:

> Can it be said in any proper sense, and within the meaning of the language of the statute, that these lands belonging to the plaintiff in the defendant township are "used for public purposes?" *Id.* at 330.

This Court ultimately ruled that:

> The lands not only are not used for any public purpose, but they are not used for any purpose. They lie in a state of nature and no attempt has, to the present time, been made to utilize them for the development of power, which is the only use of value that can be made of them. *Id.* at 330-31.

In summary, this Court held that the city's vacant, unused land was taxable because "the use which warrants exemption mentioned in the statute is a present use, and not an indefinite prospective use." *Id.* at 331. This Court's ruling in *Traverse City* continues to be controlling law in Michigan, and its precedent should be followed.

Similar to the facts involved in the *Traverse City* case, MERS holds its investment property for an indefinite prospective use. The Court of Appeals distinguished the present case from *Traverse City*, however, because MERS is permitted to invest in land "as part of a diversified investment portfolio"

pursuant to MERA and PERSIA. *Municipal Employees Ret Sys of Mich, supra* at 513. That distinction lacks validity because, as this Court correctly recognized in *Traverse City*, whether MERS is authorized to invest in land is not at issue. See *Traverse City, supra* at 331. This case is about whether, when it invests in land, MERS is entitled to a tax exemption under MCL 211.7m for that purpose. While MERA and PERSIA do grant MERS the power to acquire property as an investment, neither MERA nor PERSIA grant MERS' investment property an express exemption from taxation. Holding land as an investment is not considered to be a public use or purpose under MCL 211.7m. Thus, the Court of Appeals made an unjustified leap in logic by concluding that MERA and PERSIA support MERS' claim for a tax exemption under MCL 211.7m.

Statutory authority to acquire and own property is insufficient for an eligible public entity to obtain a tax exemption under MCL 211.7m. Most, if not all, municipalities are statutorily authorized to acquire and own property, yet the law is clear that not all property owned by a municipality is exempt from real property taxation. Cities are authorized to own and hold land, yet this court denied a tax exemption for city-owned property in *Traverse City, supra*. Further, MERS is not *required* by either MERA or PERSIA to hold land as an investment, and nothing in those statues indicates that MERS should be given a special tax advantage when it engages in real estate investment. Additionally, neither statute contains an express tax exemption. If the Legislature had intended, it could have expressly granted MERS the exemption that it seeks, but did not.

Consequently, MERS' "use" of its investment property under MCL 211.7m must be more than mere ownership. In *Rural Agricultural Sch Dist v Blondell* 251 Mich 525, 527; 232 NW 377 (1930), this Court clarified that, if the utility or use of an investment in land will not manifest, if ever, until some future date, taxation may occur in the meantime. In that case, a school district held unused

property for future use as a school. *Id.* at 526. Although subsequent Michigan law provides that schools may acquire and hold land without taxation[2], this Court, applying then-current law, held that:

> An intention to use property at some uncertain time in the future, for purposes which will render it exempt from taxation under the laws of the State, does not preclude its taxation before actually used for the purpose warranting an exemption. If the use determines the right to exemption, it is the present use and not the intended use in the future which governs. *Id.* at 527; 378 [citing 2 Cooley on Taxation (4th Ed.), § 687].

Illustrating this principle, Delta Township has never disputed that MERS' office building and the land on which it is located are clearly exempt under MCL 211.7m. In contrast to MERS' vacant investment property, its office property is both owned and actually used by MERS for a present public purpose. The latter fact distinguishes the tax treatment of MERS' office property from its investment property. Both of MCL 211.7m's prerequisites must be satisfied to obtain the tax exemption.

By including the phrases "*used for* public purposes" and "*used to* carry out a public purpose" in MCL 211.7m, the Legislature intended to add a prerequisite to the statute that would not be present without that language. Like MERS, municipalities (such as counties, cities, townships and villages) and other public entities have express statutory authority to acquire, own, and sell property. As Michigan courts have recognized, however, pursuant to the decisions described above, property owned by a municipality is not exempt from taxation under MCL 211.7m unless it is also "used for" or "used to carry out" a "public purpose." The investment of assets, the acquisition of real property, and the maximization of return on investments may be consistent with MERS' statutory authority, but this does not dictate a conclusion that MERS is entitled to a tax exemption under MCL 211.7m.

At this time, MERS simply owns the property at issue. Regardless of how that ownership interest is characterized, whether as "an investment" or "holding in its portfolio," the bottom line is that

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[2]See the discussion of MCL 380.1141 contained in footnote 3, *infra*.

MERS merely owns the property and does nothing else with it. MERS makes no other use, particularly no physical use, of the property. MERS' ownership of the property is not enough to qualify it for a tax exemption under MCL 211.7m. Instead, MERS must both own the property and use it for, or to carry out, a public purpose. MERS cannot satisfy both the ownership and "public use" requirements of MCL 211.7m merely by owning the property at issue.

MERS argues that it "uses" that property for investment, and that such a "use" is contemplated by its enabling statutes. That argument is somewhat tempting, because the words "use" and "used" are commonplace in Michigan law and have flexible meanings depending on context. For example, the "use" of land implies something different than the "use" of an intangible financial asset, such as money. MERS argues that it "uses" its land because it treats it like an intangible financial asset and has been uniquely empowered by the Legislature to view land in that manner. Although Delta Township concedes that MERS' vacant land might be "useful" to MERS as an investment asset, this does not change the fact that the land at issue is not "used" for anything but a speculative, future profit.

Unlike in the present case, the appellate court in *Mt. Pleasant* held that "an owner must do more than market a property for sale to say that it is used, even where the sale revenue will unquestionably be used for a public purpose." *Mt. Pleasant, supra* at 5 [quoting *In re City of Wichita*, 255 Kan 838; 877 P2d 437, 443 (Kan 1994)]. The court in that case also found that the word "use" in MCL 211.7m means "some active, actual utilization of the property." *Id.* As MERS' property is not "actively, actually" used, this Court should overturn the Court of Appeals' decision in the present case to bring it in line with the previous decisions of this Court and to reconcile this case with the Court of Appeals' analysis in *Mt. Pleasant*.

Under the analysis in *Mt. Pleasant*, as well as this Court's precedent (especially *Traverse City, supra* and *Blondell, supra*), MERS does not "use" its investment property as contemplated by MCL 211.7m, nor is its purpose for owning such property "public." MERS' holding of investment property to sell at a future time, though it may some day benefit participating retired municipal employees, is not a present or "active, actual" use of land for a public purpose. *Id.* "[I]t is the use of the property at the time when the tax is assessed [tax day] which determines whether it is exempt from taxation or not." *State Treasurer v City of St. Joseph*, Mich App No. 194753, p. 4 (August 1, 1997) (a copy of which is attached hereto as **Attachment A**). Thus, holding property for future sale is not a present and current public use as contemplated by MCL 211.7m.

In his hornbook on taxation, the late Chief Justice of the Supreme Court of Michigan, Thomas M. Cooley, LL.D., opined that "[l]and not needed for municipal uses but held for speculative increase in value is, of course, not used for a public purpose." 2 Cooley on Taxation (4th Ed.), § 638. In reaching this conclusion, Cooley paraphrased *School District of Ft Smith v Howe*, 62 Ark 481; 37 SW 717 (Ark, 1896), as follows:

> Property purchased and held by a school district solely for the purpose of sale or lease, and as an investment, is not "used exclusively for public purposes," within the constitution, and hence is not exempt. 2 Cooley on Taxation (4th Ed.), § 638, fn. 38.

Similarly, the Legislature intended that property be "used" for a "public purpose" to be entitled to a tax exemption under MCL 211.7m. Under MCL 211.7m, in exchange for removal of property from the tax roll, an entity must actually and actively use the land for a public purpose, that is, for the benefit of the general public. For example, property used for a public park or municipal fire station is entitled to a tax exemption because the use of the property provides the public with a present and actual benefit in exchange for the exemption. The Legislature's intent is apparent in the language contained in MCL

211.7m which states, "[p]arks shall be open to the public generally." *Id.* Thus, with respect to park property, the public enjoys the benefit of the use of the park in exchange for the loss of tax revenues that the property would have generated if it had not been removed from the tax roll.

MERS' alleged "use" of its investment property is inconsistent with the Legislature's apparent intent. Not only is there no actual, physical use of the property, there is also no actual, present benefit to the general public, or to anyone else for that matter, from MERS' ownership of the property. The eventual sale of MERS' property, hopefully at a profit, will not occur until an uncertain future date, perhaps many years from today. Should the value of MERS' properties decline, or MERS sell the property at a loss, the "public" will lose twice if the property is also exempt from taxation. This suggests a difference between MERS' investments of money and other assets composed entirely of participants' retirement contributions plus interest. As to tax-free real property, MERS' investments would be contributed to -- and subsidized by -- taxpayers, many of whom hold no direct stake in the potential reward.

Even if MERS' investments successfully earn money for its participants, there is no clear authority under Michigan law to suggest that vacant investment property is "used" for a public purpose. In addition, Michigan law does not support MERS' contention that owning land constitutes a present use of MERS' property when it is held solely for investment purposes. Delta Township has no guarantee that MERS' stated "use" of the lands will arise in the future. The policy behind taxing land on its present use is to avoid situations where the taxing authority must later confirm that a party's intended future use comes to fruition.

Accordingly, MERS' use of its investment property is actually detrimental to the public and cannot be considered as a "public use" under MCL 211.7m. As the *Mt. Pleasant* court correctly

recognized, a speculative, future use of land is ineligible for a tax exemption under MCL 211.7m because such a tax exemption will deprive several taxing jurisdictions of significant tax revenues for an indefinite period of time. Those tax revenues would otherwise be put to actual, present use by the taxing jurisdictions to support public services for the general public. In contrast, MERS' future profits from its investment property, if any, would only benefit MERS' pensioners. The *Mt. Pleasant* court aptly described this issue as a "paradox." *Mt. Pleasant, supra* at 4, fn. 1.

Such a situation is not what the Legislature contemplated when it enacted MCL 211.7m. The Legislature did not intend to grant a tax exemption for property used for a prospective, speculative public purpose or benefit. By requiring property to not only be owned by a public entity, but also be "used for" or "used to carry out" a present public purpose, the Legislature intended that there be a "*quid pro quo*" in exchange for the tax exemption. That prerequisite is not satisfied when investment property owned by a public entity, such as MERS, sits idle. Accordingly, MERS is not entitled to an exemption under MCL 211.7m, especially in light of this Court's prior interpretations of that statute and the difficult "beyond a reasonable doubt" standard of proof recognized by this Court in *Ladies Literary Club, supra.*

If MERS is permitted to acquire and hold real property as an investment, free of taxation, there are several potential adverse consequences, none of which could have been intended by the Michigan Legislature when it enacted MCL 211.7m. First, MERS would have a significant competitive advantage in the real estate market in comparison to private individuals and entities, whose investment properties would be taxed. In addition, under current law, MERS would have an advantage over municipalities, as they would also be required to "use " such property in an actual, active manner.

MERS could potentially acquire large tracts of desirable real estate and hold it for an indefinite period of time, removing the property from the tax rolls and reducing the tax revenues for local governments, the State of Michigan and other taxing jurisdictions. It seems plausible that MERS could craft an argument that, under MCL 211.7m, it could acquire developed property and hold it tax exempt, since MERS' would satisfy MCL 211.7m's "use" requirement by adding the property to its investment portfolio. That is a potential consequence if MCL 211.7m's "use" requirement is interpreted as allowing a future, speculative use instead of an actual, active use as established Michigan law mandates. None of the above-described possibilities were intended by the Michigan Legislature when it enacted MCL 211.7m, and MERS should accordingly be denied a tax exemption for its investment property.

III. THE MICHIGAN COURT OF APPEALS' DECISION CONSTITUTES CLEAR LEGAL ERROR AND SHOULD BE REVERSED BECAUSE, IN REACHING ITS DECISION, THE APPELLATE COURT INFERRED A TAX EXEMPTION FROM AMBIGUOUS STATUTORY LANGUAGE.

A. Standard of Review.

Delta Township incorporates by reference the *de novo* standard set forth in Section I(A) of the Argument.

B. Application of Standard.

1. Neither MERA Nor PERSIA Grant a Clear and Express Tax Exemption to MERS' Vacant Investment Property.

The Michigan Court of Appeals agreed with MERS' position in this case, holding that MERS' investment property qualifies for a tax exemption under MCL 211.7m because: (1) MERS is statutorily required by MCL 38.1539(2) to hold and invest money and assets in its course of business and may "use" such assets for no other purpose, and (2) MERS is statutorily permitted to invest in real estate. MCL 38.1536(10). The appellate court reasoned:

> Under the MERA, "[a]ll money and other assets of the retirement system shall be held and invested for the sole purpose of meeting disbursements authorized in accordance with the provisions of this act and shall be used for no other purpose." MCL 38.1539(2). By the plain language of this statute, petitioner is required to hold and invest other assets, such as the land in question, for the purpose of meeting its disbursement requirements. Furthermore, the statute specifically states that the assets held or invested "shall be used for no other purpose." *Id.* (emphasis added). The phrase "used for no other purpose" necessarily contemplates that the only proper "uses" for assets under the act, is to hold or invest them. Consequently, the act of holding real property assets in petitioner's portfolio, ready for liquidation to meet its statutorily mandated disbursement requirements, is a present use rather than "an indefinite prospective use." *Traverse City, supra* at 331. Therefore, the land held by petitioner was properly exempt from taxation under MCL 211.7m as land used for a public purpose. *Municipal Employees Ret Sys of Mich, supra* at 513-514.

The Court of Appeals assumed that the inclusion of the word "use" in MCL 38.1539(2), albeit in the context of MERS' statutory obligation to "use" its money and other assets for no purpose other than to hold and invest, meant that MCL 211.7m's public use requirement was met. This reasoning, which largely stands alone, suggests that the "use" requirement in MCL 211.7m would be met in any instance where an entity covered by MCL 211.7m is also granted authority over property by an ancillary statute containing the word "use" or "used," regardless of the context. Further, the court's opinion suggests that, upon finding the words "use" or "used" within an ancillary statute, the strict construction a court is required to afford to a tax exemption under MCL 211.7m may be eschewed.

The Court of Appeals ended its analysis by concluding that MERS' investing in property constitutes a "use" under MERA. Even assuming that the word "use" in MERA automatically translates to a "use" under MCL 211.7m, which Delta Township disputes, the appellate court failed to consider whether "use" of land for an investment purpose under MERA translates to a "public use" under MCL 211.7m.

powers are insufficient to satisfy the "public purpose" requirement of MCL 211.7m to justify the grant of a tax exemption. The *Mt. Pleasant* court also recognized the lack of an express tax exemption provision in those statutes. The court commented:

> The Legislature offers several economic development programs that provide property tax exemptions. Petitioner claims that the programs define economic development as a public purpose, and asserts it is entitled to the same exemption that these statutory programs provide, even though it did not engage in economic development under the state programs. Nevertheless, the existence of the specific economic development programs providing property tax exemptions suggests that the exemptions only exist under the terms of their enabling statutes. *Accepting petitioner's argument that it was entitled to the exemption for carrying out economic development activity would amount to a holding that portions of these enabling statutes were needless because MCL 211.7m would provide the necessary exemption. Mt. Pleasant, supra* at 4 (emphasis added).

Similarly, in the instant dispute, granting MERS a tax exemption under MCL 211.7m based upon powers under MERA and PERSIA would render express enabling statutes unnecessary. While PERSIA provides that MERS may "[i]nvest in, buy, sell, hold, improve, lease, or acquire by foreclosure or an agreement in lieu of foreclosure, real or personal property or an interest in real or personal property," there is no provision in either MERA or PERSIA that expressly provides that MERS' investment property is exempt from taxation.[3] MCL 38.1139.

Based on the existence of the specific, express tax exemptions enacted by the Michigan Legislature for certain entities and certain properties, it is apparent that the Legislature can exercise its authority to grant an exemption when it has that intent. The conspicuous absence of such an express statutory provision granting an exemption for MERS' investment property demonstrates that the Michigan Legislature did not intend to grant such an exemption from taxation. Interpreting the general

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[3]In contrast, see Section 1141 of the Revised School Code, MCL 380.1141, which applies to public schools, and Section 503(8), MCL 380.503(8), which addresses the investments of public school academies. There is no comparable express statutory exemption for MERS' investment property in MERA or PERSIA, or otherwise in Michigan law.

provisions of MERA and PERSIA to grant a tax exemption when they contain no such express provision would render portions of other statutes "needless," and would undermine the Legislature's intent. *Mt. Pleasant, supra* at 4. Thus, the presumption in favor of taxation and the rules of statutory interpretation dictate a finding that neither MCL 211.7m, MERA, PERSIA, nor any other statute, exempts MERS' investment property from taxation.

In the decision from which Delta Township appeals, the Court of Appeals inferred from the powers granted to MERS under MERA that the Legislature intended the word "use" in MCL 211.7m to carry the same meaning as the word "used" in MCL 38.1539(2). The Court of Appeals looked beyond the plain language of MCL 211.7m, MERA, and PERSIA to infer the tax exemption that MERS seeks. As such, the court improperly concluded that because MERS is entitled to hold land as an investment asset, and is not permitted to use any of its investment assets for any purpose other than investment, that MCL 211.7m's "public use" requirement is met. This "leap in logic" is based on MERS' theory that the Legislature intended that using a vacant lot for no actual, present purpose could be an actual, present use if an entity thinks of the land not as real property, but as money or an asset.

Under the strict construction analysis required, however, MERS must demonstrate that it has an express statutory tax exemption to overcome the presumption in favor of taxation. Neither MCL 211.7m, MERA, nor PERSIA clearly and unambiguously grant the tax exemption MERS seeks beyond reasonable doubt. Nor does any other statute. Michigan law does not permit a tax exemption to be inferred from ambiguous statutory language. Therefore, MERS' vacant land, which is held solely for a prospective increase in value, is not "used for" or "used to carry out" a "public purpose" under MCL 211.7m, and, therefore, is subject to taxation.

IV. THE MICHIGAN COURT OF APPEALS' DECISION CONSTITUTES CLEAR LEGAL ERROR AND SHOULD BE REVERSED BECAUSE THE COURT GAVE UNDUE DEFERENCE TO THE LAW OF ANOTHER STATE.

A. Standard of Review.

Delta Township incorporates by reference the *de novo* standard set forth in Section I(A) of the Argument.

B. Application of Standard.

In extrapolating MERS' statutory authority to invest in real property to find that MERS may do so free from taxation, the Court of Appeals improperly relied on two cases from Pennsylvania. *Commonwealth v Dauphin County*, 354 Pa 556; 47 A2d 807 (1946); and *Pennsylvania Turnpike Commission v County of Fulton*, 195 Pa Super 517, 522; 171 A2d 882, 884 (1961). The appellate court stated:

> Here, the vacant properties are held by petitioner not for ancillary investment purposes, but as part of a diversified investment portfolio pursuant to petitioner's statutory duty to administer funds. MCL 38.1536(10) and MCL 38.1139(2). See *Commonwealth v Dauphin County*, 354 Pa 556; 47 A2d 807 (1946) and *Pennsylvania Turnpike Commission v County of Fulton*, 195 Pa Super 517, 522; 171 A2d 882, 884 (1961). *Municipal Employees Ret Sys of Mich, supra* at 513.

The Court of Appeals' reliance on Pennsylvania decisions was improper because those cases are factually distinguishable and inconsistent with Michigan law. In doing so, the court distinguished the present case from cases relied on by the Tax Tribunal in its Order. (**Appellant's Appendix** - tab 5, p. 56a).

Pennsylvania's courts recognize a narrow tax exception for state agencies that obtain deeds to preserve funds invested in mortgage securities. See *Commonwealth of Pa State Employees' Ret Sys v Dauphin County*, 335 Pa 177, 6 A2d 870 (1939); *Commonwealth v Dauphin County, supra*, and

Commonwealth Dept of Public Assistance v Schuylkill County, 361 Pa 126, 62 A2d 922 (1949). That exemption is not recognized under Michigan law and has not been addressed by Michigan courts.

In *Commonwealth v Dauphin County*, *supra*, the Pennsylvania State Workmen's Insurance Board, an administrative board functioning under that state's Department of Labor and Industry, was authorized by state statute to "invest any of the surplus or reserve belonging to the Fund in such securities and investments as are authorized for investment by savings banks." *Commonwealth v Dauphin County*, *supra* at 558; 808. Pursuant to its authority to invest surplus funds in securities, the Board loaned $200,000 on the security of a mortgage. *Id.* at 559; 808. When the debtor defaulted, the Board obtained a deed for the property in order to "conserve the property of the Fund." *Id.*

At issue was whether the Board was required to pay tax on the property under the facts of that case. Following established Pennsylvania Supreme Court precedent regarding whether Pennsylvania state agencies may temporarily hold property to protect investments in mortgage securities, the court held that the property was exempt from taxation. *Id.* at 562; 810. Notably, that case did not involve an entity that wished to invest funds in vacant land for speculative, future profit, nor did it address the issue of whether such an investment would be considered a use of land for, or to carry out, a public purpose.

Even if the decision had been on point, however, the present case involves Michigan law and should be resolved by looking first to the plain language of the applicable statutes, then to the prior holdings of this Court, then to the lower courts of this State, and finally to the decisions of the Michigan Tax Tribunal. Cases from other jurisdictions, if considered at all, should be afforded minimal deference. This is particularly true when the law of a foreign jurisdiction is distinguishable from the Michigan law at issue. *People v Stone*, 463 Mich 558, 566; 621 NW2d 702 (2001).

In the second case cited by the Court of Appeals, *Pennsylvania Turnpike Commission, supra*, the Pennsylvania Superior Court held that vacant and unused lands held by the Pennsylvania Turnpike Commission were *not exempt* from taxation because they were not used for any purpose. *Pennsylvania Turnpike Comm, supra*. The court distinguished the facts of *Commonwealth v Dauphin County*, where the agency held securities on a mortgage investment, from the facts of that case, where the acquisition of real estate "was not essential . . . and had no connection with the maintenance or operation of the turnpike." *Id.* at 522; 884-85. If anything, the tax exemption MERS seeks should be denied under the same rationale stated in *Pennsylvania Turnpike Comm*, namely because MERS has acquired vacant land for no specific use other than to sell at some future date. *Id.* at 517; 882. As to that issue, the court in *Pennsylvania Turnpike Comm* held that "the fact of nonuse does not help appellant." *Id.* at 521; 884. Nor should the fact of nonuse help MERS.

The Court of Appeals erred when it relied on decisions from Pennsylvania courts to expand the requirement that entities such as MERS use lands for, or to carry out, a public purpose. This Court is not bound by the Pennsylvania Supreme Court's construction of Pennsylvania law, nor are such cases persuasive. Therefore, the appellate court's reliance on the Pennsylvania Supreme Court's decision to overturn the Tax Tribunal's Order constitutes legal error.

CONCLUSION AND RELIEF REQUESTED

Under established Michigan law, tax exemption statutes are strictly construed in favor of taxing authorities, and there is a strong presumption in favor of taxation. MERS cannot overcome the presumption in favor of taxation in this case because MCL 211.7m does not clearly and unmistakably provide a tax exemption for its investment property, nor does any other Michigan statute. Further,

vacant land held by MERS as an investment solely for a prospective increase in value and speculative future profit is not "used for" or "used to carry out" a public purpose as contemplated by MCL 211.7m.

In reversing the Michigan Tax Tribunal's decision and granting MERS a tax exemption for its investment property, the Michigan Court of Appeals improperly disregarded the strong presumption in favor of taxation found in Michigan law. The Court of Appeals also erroneously inferred a tax exemption from various statutory provisions and case law from another state. The Court of Appeals' decision conflicts with established Michigan Supreme Court precedent in *Traverse City*, as well as the appellate court's analysis in the recent *Mt Pleasant* decision.

In order to effectuate the Michigan Legislature's intent with respect to MCL 211.7m, and to reaffirm and clarify the law in Michigan regarding the interpretation of MCL 211.7m and other tax

exemption statutes, Delta Township respectfully requests that this Court deny MERS the exemption from ad valorem taxation for its investment property, reverse the Michigan Court of Appeals' decision in this case, and affirm the Michigan Tax Tribunal's Order granting summary disposition in favor of Delta Township.

Respectfully submitted,

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